

## **APPENDIX B**

- B. (1) Letter from Daniel Donovan to Tara Veazey, Chair, Montana Public Defender Commission. February 9, 2009.**

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February 9, 2009

VIA E-MAIL ([tveazey@mtsla.org](mailto:tveazey@mtsla.org))  
Tara Veazey  
Chair, Montana Public Defender Commission  
616 Helena Avenue, Suite 100  
Helena, MT 59601

Re: Montana Public Defender Commission  
Our File: PDC-01

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Dear Tara:

You will recall that I submitted a Memorandum dated April 15, 2008 to the Commission, Randi Hood, and OPD Attorneys and Staff. To my recollection, you were the only one who expressed any concern regarding the issues I raised in the Memorandum. Regardless, there is one issue that I believe requires the immediate attention of the Commission and OPD.

This issue relates to the Third ABA Principle and is set forth in the Memorandum as follows:

**3. Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.**

Commentary: "Counsel should be furnished upon arrest, detention, or request, and usually within 24 hours thereafter."

My Evaluation: By statute, the PDC is to "establish protocols to ensure that the office makes appropriate assignments in a timely manner." § 47-1-104(3), MCA. The PDC has adopted standards relating to the early entry of lawyers into cases. *See*, Standards at ¶ III2A ("Effective representation should be available to an eligible person upon request.....as soon as the person is under investigation, [or is] arrested, [or] charged."). Certainly, early entry is critical. Had not Al Avignone been assigned by the Bozeman Public Defender to represent John Lebrum shortly after arrest and had not Al immediately gone to the jail to meet with Lebrum, the result of the case would likely have been much less favorable to Lebrum.

The Standards also require representation prior to, and at, the initial appearance. *See*, Standards at ¶ III2B (The defendant "shall be entitled to consult with a public defender for not less than 15 minutes prior to his or her first court appearance."). To the best of my knowledge, potential PD clients in Cascade County are not being provided with counsel at the initial felony appearance. If so, this practice should be changed, in part, because, "[i]f feasible, counsel should offer representation for the initial appearances for the purpose of making a bond argument." *Id.* I know from experience in Cascade County that the district judges will reduce bail if the defendant

is represented by counsel at the initial appearance. Perhaps procedures could be in place whereby a paralegal or financial eligibility tech could go to the jail first thing every morning to interview all new arrestees prior to the initial appearance. If a client is released on his or her own recognizance or is able to bond out at a lower bail after the initial appearance, the jails will be less crowded and the local authorities will save money on confining prisoners. Also, by saving money which would have otherwise been used for bail, the client and the client's family may have sufficient funds to retain private counsel and thus lighten the OPD caseload.

Legal representation in connection with the initial appearance is not merely a standard to strive for but is required by Federal constitutional law. In *Rothgery v. Gillespie County*, 128 S. Ct. 2578 (2008), the issue was whether the accused's right to counsel attached at the initial appearance. The Supreme Court "reaffirm[ed] what we have held before and what an overwhelming majority of American jurisdictions understand in practice: a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel." *Id.* at 2592; *see also* 2581 (The 6<sup>th</sup> Amendment right to counsel "applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty. [citations omitted].").

One could contend, based on the concurring opinions in *Rothgery*, that it is constitutionally permissible for counsel to be appointed "within a reasonable time" after the initial appearance. *See also*, MCA 46-8-101("without unnecessary delay"). However, the *Rothgery* majority re-observes that "in most States, at least with serious offenses, free counsel is made available at [the first formal proceeding against the accused]." *Id.* at 2586 (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 180-181(1991)). From my observation of felony initial appearances in Cascade County, bail is set by the court based on written input from the Cascade County Attorney with no input from defense counsel because, ordinarily, the accused has no representation and defense counsel is not present. In my opinion, this is a critical stage of the proceedings where the State is, in effect, being represented by counsel and the defendant is not being represented by counsel. Particularly because the adopted and approved PDC standard requires that the accused "shall be entitled to consult with a public defender for not less than 15 minutes prior to his or her first court appearance," it is not acceptable for our Montana criminal justice system, here in Cascade County or elsewhere, to assign counsel after the initial appearance.

I realize that it costs more for OPD to provide effective assistance of counsel, i.e., counsel who have interviewed the accused prior to court and who have gained some familiarity with the case, at initial appearances. But nothing less is required and, I am told, this procedure is in effect in Gallatin County. Furthermore, as stated in the Memorandum, the Montana criminal justice system, overall, will save money in the long run as well. More importantly, the goal of equal justice for all is more likely to be achieved if the accused in Montana is represented by counsel at initial appearances.

Very truly yours,

THOMPSON, POTTS & DONOVAN, P.C.

By

Daniel Donovan

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- B. (2) Motion for Counsel in Initial Appearance. Submitted by Daniel Donovan.  
Eighth Judicial District Court, Cascade County (March 16, 2009)**

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*Amicus Curiae*

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

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THE STATE OF MONTANA,	)	IP No. _____
	)	
Plaintiff,	)	
	)	
	)	
-vs-	)	<b>MOTION FOR COUNSEL</b>
	)	
_____ ,	)	
	)	
Defendant.	)	
	)	

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DANIEL DONOVAN, appearing as *amicus curiae* or as an officer of this Court, moves this Court to 1) suspend and delay further proceedings regarding the Defendant's initial appearance until Chief Public Defender Randi Hood and the Montana Office of the State Public Defender provide counsel and effective assistance of counsel to the Defendant, and 2) order that the Defendant be immediately released on his or her own recognizance.

This Motion is based on the following grounds and reasons:

1. The Defendant, held in custody, has been brought without counsel to appear before this Court for his or her initial appearance.
2. The Defendant's right to counsel attaches at this initial appearance. *See, e.g., Rothgery v. Gillespie County*, 128 S. Ct. 2578 (2008) ("[A] criminal defendant's initial appearance before a

judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.”).

3. While indigent defendants are seldom, if ever, represented by counsel at initial appearances held by this Court, the State is represented at every initial appearance proceeding by the Cascade County Attorney’s Office, either by the actual presence of counsel for the State or by submission of written documents to this Court by counsel for the State.

4. Without any information submitted by defense counsel on behalf of a defendant, this Court customarily sets bail at initial appearance proceedings based on information submitted by counsel for the State of Montana. This can result in bail being set in an oppressive or unreasonable sum.

5. Without any information submitted by defense counsel for a defendant at initial appearance proceedings in this Court, this Court customarily sets the date and time for a judicial determination of probable cause based on information submitted by counsel for the State of Montana. This can result in a defendant being detained in custody for an unreasonable time without a judicial determination of probable cause. Bernard v. City of Palo Alto, 699 F.2d 1023, 1025 (9<sup>th</sup> Cir. 1983) (“The arresting officer’s determination of probable cause justifies only ‘a brief period of detention to take the administrative steps incident to arrest.’ Gershtein, 420 U.S. at 114, 95 S.Ct. at 863. Detention beyond that period requires a determination of probable cause by a neutral magistrate”).

6. The failure of Chief Public Defender Randi Hood and the Montana Office of the State Public Defender to provide counsel and effective assistance of counsel to indigent defendants prior

to, at, during, and after initial appearance proceedings in this Court serves to deny a defendant his or her rights as guaranteed by the Federal and State Constitutions including, but not limited to, those rights enumerated in the 5<sup>th</sup>, 6<sup>th</sup> 8<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution and those rights enumerated in Sections 3, 4, 10, 11, 16, 17, 20, 21, 23, 24, 25, 26, 27, and 34 of Article II of the 1972 Montana Constitution..

7. The Montana Legislature has directed the Public Defender Commission to “establish statewide standards for the qualification and training of attorneys providing public defender services to ensure that services are provided by competent counsel and in a manner that is fair and consistent throughout the state. The standards must take into consideration:.....practice standards.” § 47-1-105(2)(e), MCA. The Public Defender Commission has carried out this legislative mandate by adopting and approving the Standards for Counsel Representing Individuals Pursuant to the Montana Public Defender Act. The latest version of said Standards are set forth on the website of the Office of the State Public Defender.

8. The failure of Chief Public Defender Randi Hood and the Montana Office of the State Public Defender to provide counsel and effective assistance of counsel to indigent defendants prior to, at, during, and after initial appearance proceedings in this Court is also contrary to, and in violation of, the Standards for Counsel Representing Individuals Pursuant to the Montana Public Defender Act. Although “ said Standards are intended to be used as a guide to professional conduct and performance...[and]...are not intended to be used as criteria for the judicial evaluation of alleged misconduct of counsel” (Standard No. I.2.A.), said Standards require counsel representing individuals pursuant to the Montana Public Defender Act to provide effective assistance of counsel and to at least make an effort to, inter alia:

- a. “perform to a high standard of representation” (Standard No. I.1.);
- b. provide services of counsel to an eligible person not in custody “at the person’s first appearance before a judicial officer” (Standard No. III.2.B.);
- c. provide services of counsel to a person in custody who is not represented by retained counsel such that said person “shall be entitled to consult with a public defender for not less than fifteen minutes prior to his or her first court appearance” (Standard No. III.2.B.);
- d. if feasible, “offer representation for the initial appearance for the purposes of making a bond argument” (Standard No. III.2.B.);
- e. “make personal contact with the person within three working days.....[w]hen a court incarcerates a person who appears before it and that person requests indigent representation” (Standard No. III.2.B.);
- f. provide “prompt and effective communication with the client” (Standard No. IV.1.A.);
- g. “strive for excellence in the representation of the indigent client” (Standard No. III.2.);
- h. “make sure that counsel has available sufficient time, resources, knowledge, and experience to offer effective representation to a defendant in a particular matter” (Standard No. VI.1.A.);
- I. “meet with incarcerated defendants as stated previously in these Standards, and shall take other prompt action necessary to provide quality representation, including:....[a]ttempting to secure the pretrial release of the client” (Standard No. VI.2.A.b.);
- j. comply with the duties for Pretrial Release Proceedings set forth in Standard No.



VI.4.; and

k. comply with the duties for Preliminary Hearings set forth in Standard No. VI.5., including the duty to “take steps to see that the hearing is conducted in a timely fashion, unless there are strategic reasons for not doing so”.

9. The undersigned is informed and believes that Chief Public Defender Randi Hood and the Montana Office of the State Public Defender should be able to provide counsel and effective assistance of counsel to indigent defendants prior to, at, during, and after initial appearance proceedings held in the Montana Eighth Judicial District Court, Cascade County because Chief Public Defender Randi Hood and the Montana Office of the State Public Defender are presently providing counsel and effective assistance of counsel to indigent defendants prior to, at, during, and after initial appearance proceedings in other judicial districts, including the Montana Eighteenth Judicial District Court, Gallatin County.

WHEREFORE, premises aforesaid, the undersigned respectfully requests this Court to grant the relief requested or, alternatively, grant such other and further relief to ensure that the Defendant’s constitutional rights are upheld and protected, including the Defendant’s right to counsel and right to effective assistance of counsel.

DATED this 16<sup>th</sup> day of March, 2009.

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DANIEL DONOVAN  
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P. O. Box 2799  
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*Amicus Curiae*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing was served upon the persons named below by mailing, hand-delivery, Federal Express, or by telecopying to them a true and correct copy of said document.

☐ U.S. Mail   ☒ Hand-delivery   ☐ Federal Express   ☒ Fax

RANDI HOOD  
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*Counsel for the State of Montana*

this 16<sup>th</sup> day of March, 2009.

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- B. (3) *State of Montana Vs. David Pando*. Order to Provide Assistance of Counsel to Indigent Defendants at Initial Appearance. Eighth Judicial District Court, Cascade County, March 19, 2009**

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

STATE OF MONTANA,

Plaintiff,

-vs-

DAVID PANDO,

Defendant.

IP No.:

CAUSE NO. BDC-07-456

**ORDER TO PROVIDE ASSISTANCE  
OF COUNSEL TO INDIGENT  
DEFENDANTS AT INITIAL  
APPEARANCE**

Comes Now, the above-captioned court pursuant to U.S. Const. amend. VI and XIV, Mont. Const. art. II, § 24, and §§ 46-8-101(2) and 47-1-104(3), MCA, and hereby orders the Office of State Public Defender to immediately provide assistance of counsel to any and all of the following individuals who desire the assistance of a public defender at their respective initial appearances on Thursday, March 19, 2009, due to asserted financial inability to retain private counsel:

(1) David Pando - Bench Warrant, BDC-07-456;

(2) Daniel Arthur Barlow; and

(3) Jacob J. Martin.

In order to facilitate compliance with this order and pursuant to §§ 3-1-113, 47-1-104(3), and 46-8-101(1), MCA, the court hereby orders the Office of State Public Defender to make contact with each of the above-named individuals by whatever means convenient as

soon as reasonably possible at or in advance of their respective initial appearances, advise each of them of their right to counsel, and inquire if they desire the aid of counsel due to financial inability to retain private counsel. Pursuant to § 46-8-101, MCA, the Office of State Public Defender shall comply with this order without unnecessary delay pending a determination of each individual's financial eligibility under § 47-1-111, MCA.

SO ORDERED this 19<sup>th</sup>, day of March, 2009.

**JULIE MACEK**

Julie Macek  
District Judge

cc: - Plaintiff c/o counsel  
- Defendant c/o counsel